

**IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT**

STATE OF TEXAS; TEXAS  
COMMISSION ON  
ENVIRONMENTAL QUALITY;  
PUBLIC UTILITY COMMISSION  
OF TEXAS; LUMINANT  
GENERATION COMPANY,  
L.L.C.; BIG BROWN POWER  
COMPANY, L.L.C.; LUMINANT  
MINING COMPANY, L.L.C.; BIG  
BROWN LIGNITE COMPANY,  
L.L.C.; LUMINANT BIG BROWN  
MINING COMPANY; L.L.C.;  
SOUTHWESTERN PUBLIC  
SERVICE COMPANY; COLETO  
CREEK POWER, L.P.; NRG  
TEXAS POWER, L.L.C.; NUCOR  
CORPORATION,

Petitioners,

v.

No. 16-60118

UNITED STATES  
ENVIRONMENTAL  
PROTECTION AGENCY and  
ANDREW WHEELER, in his  
official capacity as Administrator,  
United States Environmental  
Protection Agency,

Respondents.

**RESPONDENTS' STATUS REPORT ON REMAND**

On March 22, 2017, the Court entered an Order in which it granted EPA's motion for a partial voluntary remand and remanded the final rule challenged in this case to EPA. On April 7, 2017, the Court granted EPA's unopposed motion to modify the time intervals for status reports on remand to 60 days. EPA now respectfully submits this Status Report on Remand.

1. These cases concern EPA's final action establishing "reasonable progress" requirements for regional haze under the Clean Air Act ("CAA"), 42 U.S.C. §§ 7401-7671q, titled: "Approval and Promulgation of Implementation Plans; Texas and Oklahoma; Regional Haze State Implementation Plans; Interstate Visibility Transport State Implementation Plan to Address Pollution Affecting Visibility and Regional Haze; Federal Implementation Plan for Regional Haze" ("Final Rule"). The Final Rule was published at 81 Fed. Reg. 296 (Jan. 5, 2016).

2. As EPA explained in previous status reports, the initial significant action EPA expects to take on remand is to publish a notice of proposed rulemaking proposing to reconsider certain aspects of the Final Rule pertaining to the CAA's reasonable progress requirements.

*See* 42 U.S.C. § 7607(d)(7)(B). But it has been EPA’s intent to first finalize action on the related but separate CAA Best Available Retrofit Technology (“BART”) requirements.

3. EPA published a BART final rule on October 17, 2017, 82 Fed. Reg. 48,324 (Oct. 17, 2017), which was challenged in this Court in *Nat’l Parks Conservation Ass’n, et al. v. EPA*, Case No. 17-60828 (5th Cir.). After the petitioners in that case filed an administrative petition with EPA requesting reconsideration of the BART final rule, this Court held that case in abeyance pending the resolution of the petition for reconsideration and the completion of any reconsideration process.

4. Following multiple proposals and public comment periods, EPA has now completed reconsideration proceedings on the BART final rule. Promulgation of Air Quality Implementation Plans; State of Texas; Regional Haze and Interstate Visibility Transport Federal Implementation Plan (“2020 BART Rule”), *available at* [https://www.epa.gov/sites/production/files/2020-06/documents/frn\\_tx\\_rh\\_trading\\_rule\\_affirmation-\\_final\\_rule\\_6-19-20.pdf](https://www.epa.gov/sites/production/files/2020-06/documents/frn_tx_rh_trading_rule_affirmation-_final_rule_6-19-20.pdf).

5. Now that the BART requirements in Texas have been determined, EPA intends to turn its attention to developing a notice of proposed rulemaking to address the reasonable progress requirements on remand in this case. EPA is currently coordinating with Texas, which EPA understands is now preparing a state implementation plan submittal, due by July of 2021, to address reasonable progress requirements for the second planning period. To the extent that outstanding reasonable progress requirements from the first planning period remain, EPA is in discussions with Texas regarding how EPA and the State may address those in concert with the requirements for the second planning period. EPA is therefore considering options for addressing the remand through the process of reviewing the potential upcoming state implementation plan submittal from Texas, which may obviate the need for separate rulemaking action to reconsider EPA's remanded plan, as originally intended.

6. Accordingly, agency proceedings on remand are ongoing and this case should therefore remain in abeyance.

7. EPA's next 60-day status report is due to be filed on or before September 22, 2020.

Dated: July 24, 2020

Respectfully submitted,

/s/Samara M. Spence

Samara M. Spence

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Environmental & Natural Resources

Division

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**CERTIFICATE OF SERVICE**

I hereby certify that the above status report was electronically filed with the Clerk of the Court using the CM/ECF system, which will send notification to the attorneys of record, who are required to have registered with the Court's CM/ECF system.

Date: July 24, 2020

/s/ Samara M. Spence  
Samara M. Spence  
*Counsel for Respondent*